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No. 91-1528

In the Supreme Court of the United States

OCTOBER TERM, 1991

SAMUEL MESNICK,
PETITIONER,
v.
GENERAL ELECTRIC COMPANY,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court and the court of appeals erred in entering summary judgment against petitioner on his age discrimination claims where, as the court of appeals held, the "record contained no evidence from which a rational jury could infer . . . that [the employer's] legitimate, nondiscriminatory reason for cashiering Mesnick was actually a pretext for age discrimination?"

2. Whether a record replete with instances of insubordinate employee behavior characterized by the court of appeals as "antagonistic" and "disruptive" presents an appropriate occasion for this Court's consideration of differing verbal formulations by and within the several circuit courts of the *McDonnell Douglas-Burdine* scheme in the summary judgment context?

RULE 29.1 LIST

Pursuant to Supreme Court Rule 29.1, respondent General Electric Company provides the following list of subsidiaries (except wholly owned subsidiaries and those subsidiaries whose shares or debt securities are not publicly traded). General Electric Company does not have a parent company.

GECC Financial Corporation

General Electric Capital Corporation
(formerly General Electric Credit Corporation)

General Electric Capital Canada, Inc.

General Electric Credit International, N.V.

General Electric Financial Services, Inc.

Montgomery Ward Credit Corporation

Montgomery Ward & Co., Incorporated
(50% GE owned)

CAMCO, Inc. (Canada) (51% GE owned)

PROCEDURAL STATEMENT

Pursuant to Supreme Court Rule 24.2, respondent General Electric Company relies on the petition for Opinions Below, Jurisdiction and Statutes Involved. No List of Parties is required.

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent General Electric Company respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the First Circuit's opinion in this case. That opinion is reported at 950 F.2d 816.

STATEMENT OF THE CASE

Contrary to the assertions of petitioner Samuel Mesnick ("Mesnick"), this case involves merely the proper, summary disposition of an age discrimination claim deviod of any eviden-

tiary support. Any purported conflict with decisions of this Court or other courts of appeals is irrelevant, as the same result would have been reached in any circuit. Indeed, this case's only distinguishing feature is the fact that virtually all of the evidence adduced by General Electric in connection with its summary judgment motion was derived either from testimony given or documents authored by Mesnick. Because this plethora of undisputed evidence of insubordinate and offensive behavior amply demonstrates that this fact-specific decision is entirely consistent with this Court's decisions under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 ("ADEA"), a relatively detailed statement of the case is warranted.

A. *Procedural History.*

On January 21, 1988, Mesnick, while still employed by General Electric, filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging that he was demoted and replaced by a younger person in violation of the ADEA. Later, following the termination of his employment in September, 1988, Mesnick filed a second charge with the EEOC, asserting unlawful retaliation by General Electric. After a full investigation, the EEOC found no probable cause to believe that the challenged actions stemmed from an unlawful, discriminatory or retaliatory motive. In pertinent part, the EEOC Determination Notice stated as follows:

> Examination of the evidence indicates that on many occasions Charging Party made inflammatory comments orally and in writing abouth [sic] the newly hired supervisor concerning his lack of knowledge for the position. Charging Party had been repeatedly warned verbally and in writing to desist this abusive behavior. After approximately seven months of this insubordinate behavior Charging Party was warned that he would be terminated if it continued. Two months later Charging Party was ter-

> minated. Because of Charging Party's abusive conduct and poor performance, Respondent did not feel he was entitled to a merit increase.
>
> Respondent's policy states that terminated employees are not entitled to severance pay. Based on this analysis, I have determined that the evidence obtained during the investigation does not establish a violation of the statute.

(*Mesnick* v. *General Electric Company*, EEOC Charge No. 161890171, Boston Area Office, Determination issued July 28, 1989).

In July, 1989, Mesnick commenced this action in the United States District Court for the District of Massachusetts alleging that General Electric had discriminated against him on account of his age by not selecting him for a promotion and, when he filed a charge of discrimination with the EEOC, had retaliatorily harassed him and terminated his employment. After the close of discovery in this matter, General Electric filed a motion for summary judgment on November 1, 1990. Upon full review of the briefs submitted by both parties, the district court granted General Electric's motion for summary judgment. After oral argument, the First Circuit affirmed the entry of summary judgment in General Electric's favor. Mesnick did not petition for rehearing.

B. *Factual Background*

Mesnick's statement of facts conspicuously omits any reference to his long and undisputed history of performance and behavioral problems both at General Electric and his former employer, Radio Corporation of America ("RCA") (1974-1986), with which General Electric merged in 1986. During his last several years at RCA, Mesnick's behavior led to numerous complaints from customers and other employees. (Pet. App. B-5).[1]

[1] References to "Pet. App. A-__" and "Pet. App. B-__" are to the opinions of the First Circuit and the district court in this case, respectively, reprinted in Petitioner's Appendix.

Mesnick was vulgar; he was insulting; he made racial slurs and sexist remarks; and he was habitually late to work and took long drinking lunches. *Id.* Mesnick's managers spoke with him about these performance issues on several occasions and considered whether he should be removed from his managerial position or terminated outright from RCA. *Id.* RCA finally decided to remove Mesnick from his management position and place him in an individual contributor role without supervisory responsibility. The GE-RCA merger intervened and, as a result, the decision to remove Mesnick was deferred.

After the 1986 merger, General Electric created the Automated Systems Department ("ASD") which combined RCA's automated systems business in Burlington, Massachusetts with General Electric's automated systems business in Huntsville, Alabama. (Pet. App. B-3). As a result of this reorganization, entirely new General Electric management was installed in place of the former RCA management at the Burlington facility at which Mesnick was employed, including his direct supervisor Achilles Georgiou, Manager of Finance (Pet. App. B-3, 6) and Salvatore Capodici, General Manager of ASD, to whom Georgiou reported.

Almost immediately following the installation of these new General Electric managers, Mesnick made clear his lack of respect and even disdain for the new corporate culture. He ridiculed the way in which the contracts function was positioned within General Electric's structure and made clear his dissatisfaction with any deviation from the RCA mores. (Pet. App. B-12). As his behavior during ensuing months revealed, this antagonism toward General Electric's management style was profound.

Without any prior knowledge of such antagonism, Georgiou, following his January, 1987 arrival at the Burlington facility, discussed with former RCA managers Mesnick's many performance problems. (Pet. App. B-6). In particular, Georgiou was told that Mesnick had shown himself to be a "vulgar, bigoted, sexist lout who insulted subordinates, offended clients [and]

drank to excess during lunch. . . ." (Pet. App. A-3-4). Based upon these discussions and his own observation of Mesnick's performance, Georgiou, in March, 1987, gave Mesnick a performance review. (Pet. App. B-6). In this evaluation, Georgiou acknowledged Mesnick's technical abilities, but also noted several recurring criticisms of his behavior. (Pet. App. B-6-7).

Mesnick disputed Georgiou's evaluation of his peformance and began sending him offensive memoranda in an attempt to have the review modified. (Pet. App. B-8). Following a meeting with Georgiou at which he again sought to have his evaluation changed, Mesnick attempted to go over Georgiou's head to the facility's top executive, Capodici. (Pet. App. A-6). Specifically, Mesnick authored a memorandum to Capodici in which he vitriolically castigated Georgiou as "extremely crass and unprofessional" and complained generally about his leadership of the Finance section. (Pet. App. A-6; B-10-11).

Thereafter, Mesnick boldly and insubordinately proposed to Capodici that he remove the Contracts area from the supervision of Georgiou, whom he accused of being incompetent. (Pet. App. B-11). In September, 1987, Mesnick prepared and presented a slide show for Capodici in which he referred to General Electric's acquisition of RCA as "bad news" and criticized Georgiou as incompetent, unprofessional and lacking in judgment. (Pet. App. A-6-7; B-12).

In the same vein, prior to a fall 1987 meeting between Capodici and the Contracts personnel, Mesnick prepared and distributed to his subordinates a list of inflammatory issues for them to raise with Capodici at the meeting. (Pet. App. B-12). Mesnick characterized General Electric employees as "either inexperienced or unqualified" and stated that working under the supervision of General Electric's Finance Management was a "big joke" and like "pitching pennies into a bottomless jar and trying to fill it up." (Pet. App. B-12). In this same time frame, he attempted to gut the department by orchestrating a mass exodus of employees to a rival company. (Pet. App. A-7; B-13). By

this time, Mesnick was openly critical of Georgiou's judgment and abilities. (Pet. App. B-11-12).

The merger and subsequent reorganization had changed staff positions and reporting relationships considerably. New positions were created in many areas of the company, including Finance and Contracts. (Pet. App. A-5; B-9). As part of this overall reorganization, Georgiou decided to create the position of Manager of ASD Contracts to be responsible for the contracts function at both the Burlington and the Huntsville facilities. (Pet. App. A-5; B-9). Mesnick learned of the creation of this new position in April of 1987, and in a conversation shortly thereafter, he and Georgiou discussed the new position. *Id.* When Georgiou informed Mesnick that he could apply and be considered for the job, Mesnick responded "What, in front of the hanging judge?" (referring to Georgiou). (Pet. App. A-5-6; B-9-10). Consistent with his contempt for Georgiou and General Electric management generally, Mesnick never applied for the new position. (Pet. App. A-7).

The actual hiring process took several months. General Electric first considered internal candidates and then also solicited outside applicants through a placement agency.[2] (Pet. App. B-13, n.4). While Mesnick knew that candidates were being interviewed, he did not apply for the position. (Pet. App. A-7). Instead, he authored still another memorandum to Capodici,

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[2] As purported evidence of age discrimination, Mesnick presented two "isolated tidbits." (Pet. App. A-32). First, Mesnick presented a single hearsay comment attributed to Georgiou, on the occasion of another employee's resignation, that he was sad to lose the youth of the workforce. The First Circuit found that this comment did not indicate a bias against older workers. (Pet. App. A-32). Second, Mesnick presented evidence that the ages of the applicants for the Manager of ASD Contracts position were supplied to General Electric by an outside placement agency. Again, the First Circuit dismissed this evidence as lacking any probative value and chastised Mesnick for failing to offer any evidence, despite ample time for discovery, that General Electric requested or even desired such information. (Pet. App. A-34-35).

explicitly criticizing Georgiou's lack of integrity, professional honesty and competence. (Pet. App. A-7; B-14). The candidate selected for the position, Steven Tubbs, was not the youngest candidate and was himself in the protected age group. (Pet. App. A-7; B-13, n.4).

On November 20, 1987, Georgiou informed Mesnick that General Electric had hired Tubbs for the new position of Manager of ASD Contracts. (Pet. App. B-13). Georgiou also explained that Mesnick's new position would be "Contract Manager - Special Projects," a position involving troubleshooting in the area of Contracts, creating the policies under which the new organization would operate, continued work in the area of government procurement and other specific projects. *Id.* Mesnick's new position was at the same salary and grade as his prior position and was just the type of individual contributor role into which RCA management had decided to move Mesnick immediately prior to the merger. (Pet. App. A-7).

Tubbs began working for General Electric on December 14, 1987. (Pet. App. B-14). From this date forward, Mesnick's conduct worsened still further. Mesnick became openly hostile toward Georgiou, Tubbs and management in general, as exemplified by such incidents as his disturbance of an outside consultant's presentation at the facility (Pet. App. B-14-15) and his use of the most profane of epithets to Capodici's face. (Pet. App. A-8). Despite being warned again for attendance and tardiness problems (Pet. App. A-8; B-15-16), these problems continued as well as his habit of drinking alcoholic beverages at lunch. (Pet. App. B-16). In addition, Mesnick persisted in preparing and distributing memoranda which were bitingly critical of his superiors' performance. (Pet. App. B-18).

In the spring of 1988, Mesnick engaged in still more provocative behavior, including his insubordinate refusal to comply with a company requirement to complete the self-evaluation portion of the evaluation process. (Pet. App. B-18). Meanwhile, the stream of hostile memoranda continued un-

abated, culminating in a blistering June 22nd memorandum to Capodici in which Mesnick excoriated Georgiou's "professional ignorance" and Tubbs' "less than average professional stature." (Pet. App. A-9; B-18). On July 18, 1988, Capodici informed Mesnick that he considered this memorandum to be "gross insubordination" and "totally unacceptable" and warned him that any recurrence would constitute "cause for immediate dismissal." (Pet. App. A-9-10; B-20). On the same day, Mesnick received an evaluation from Tubbs (despite his continued refusal to complete his self-evaluation form), which, although recognizing Mesnick's technical experience, stated that such technical abilities were "negated by his lack of interpersonal skills/confrontational attitude, contentiousness, disregard for management direction and policy, and inability/unwillingness to fulfill managerial grade expectations." (Pet. App. A-10; B-19).

In complete disregard for these explicit warnings, Mesnick escalated his assault on his superiors by invoking an internal, government contract auditing procedure (known as a 20.10 report at General Electric) to once again berate Tubbs and even call for his dismissal. (Pet. App. A-11; B-20-21). On August 25, 1988, Mesnick sent Tubbs a critical note which insinuated that Tubbs was somehow negligent. Finally, on September 7, 1988, Mesnick delivered to Tubbs and Georgiou a twelve-page memorandum which renewed the personal attacks included in his June 22nd memorandum. (Pet. App. B-21). On September 16, 1988, having endured over seventeen months of Mesnick's insubordinate diatribes, General Electric finally terminated his employment. (Pet. App. B-21-22).

REASONS FOR DENYING THE PETITION

Mesnick purports to attract this Court's interest by seizing upon a difference in the way the various circuit courts verbalize an evidentiary rule[3] and asserting its relevance to the disposition of his case. Relying upon a solitary sentence in the opinion, Mesnick seeks to resurrect his claims through a purely theoretical discussion which has no evidentiary foundation in the record. This effort must fail. The outcome of this action — regardless of the stage of the burden-shifting paradigm[4] at which Mesnick's proffered evidence is evaluated — is unaffected by the particular formulation attributed to the First Circuit. In no circuit would a case involving such egregious employee conduct be allowed to proceed to a jury.

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[3] The First Circuit, unlike some of its sister courts, has ruled in certain cases that an age discrimination plaintiff who has successfully established a *prima facie* case must prove that the stated reason for the adverse employment action is pretextual and that the real reason for the adverse personnel action was age discrimination. *See, e.g., Medina-Munoz* v. *R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 9 (1st Cir. 1990). *But see Villanueva* v. *Wellesley College*, 930 F.2d 124, 128 (1st Cir.), *cert. denied*, __ U.S. __, 112 S. Ct. 181 (1991) (stating that depending on the facts of the case "[t]here is no absolute rule that a discrimination plaintiff *must* adduce evidence in addition to that comprising the prima facie case and the rebuttal of defendant's justification in order to prevail either at the summary judgment stage or at trial.") (Emphasis in the original.)

[4] A claim of intentional discrimination is usually analyzed using the three-part formula set forth in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973) and further explained in *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981). In order to prove intentional discrimination, a plaintiff must first establish a *prima facie* case. *McDonnell Douglas*, 411 U.S. at 802; *Burdine*, 450 U.S. at 252-53. The specific proof required for a *prima facie* case will vary to meet the differing factual situations. *McDonnell Douglas*, 411 U.S. at 802 n.13. Once a plaintiff has established a *prima facie* case, the burden of production shifts to the employer to articulate a legitimate, non-discriminatory reason for the challenged personnel action. *McDonnell Douglas*, 411 U.S. at 802; *Burdine*, 450 U.S. at 253. Despite this shift of the burden of production, the burden of persuasion remains upon the plaintiff at all times. *Burdine*, 450 U.S. at 253. Once a reason is articulated, the inference raised by the plaintiff's *prima facie* case vanishes and the plaintiff must prove that the employer's stated reason was a pretext for discrimination. *Burdine*, 450 U.S. at 253, 255-56.

1. Cases arising under the ADEA are subject to the familiar burden-shifting formula enunciated by this Court in *McDonnell Douglas* and *Burdine*. Consistent with this formula, an employer is not obliged to articulate a legitimate, nondiscriminatory reason for its action — much less have to fend off purported evidence of pretext or motive — until a plaintiff first establishes a *prima facie* case. The evaluation of evidence of pretext or motive is therefore unnecessary — and certainly not dispositive — until a plaintiff has surmounted this preliminary hurdle. Accordingly, any difference between the circuits regarding the treatment of such evidence when evaluating summary judgment motions is not ripe for this Court's consideration unless the plaintiff has clearly made out a *prima facie* case.

Mesnick has not done so here. Indeed, a careful reading of the First Circuit's opinion indicates that Mesnick did not adduce sufficient evidence to meet this initial burden for any of his claims. Specifically, the district court ruled that, because he was unable to prove that he had the requisite qualifications, Mesnick failed to establish a *prima facie* case for his claims that General Electric had discriminatorily failed to promote him, had demoted him, had denied him a merit increase and had discharged him.[5] (Pet. App. B-27-33). Upon review, the First Circuit did not disturb these findings, either concurring in the district court's analysis (claims for failure to promote, demotion and denial of merit increase) (Pet. App. A-17, n.4) or assuming

[5] In order to rule out the possibility that an adverse personnel action was taken for inadequate job performance, a plaintiff must prove, as part of his *prima facie* case for these claims, that he was performing his job at a level that met his employer's expectations. *See, e.g., Loeb* v. *Textron, Inc.*, 600 F.2d 1003, 1012-13 (1st Cir. 1979); *Raschick* v. *Prudent Supply, Inc.*, 830 F.2d 1497, 1499 (8th Cir. 1987), *cert. denied*, 485 U.S. 935 (1988); *Gray* v. *York Newspapers, Inc.*, 957 F.2d 1070, 1078 (3d Cir. 1992); *Elrod* v. *Sears, Roebuck & Co.*, 939 F.2d 1466, 1469-470 (11th Cir. 1991). The district court found that Mesnick was unable to prove that he was performing his job at a level that met General Electric's expectations, and the First Circuit left this finding undisturbed. (Pet. App. A-17 n.4, A-30 n.7; B-27-33.).

otherwise solely for the sake of argument (claim for discriminatory discharge).[6] (Pet. App. A-30, n.7). With respect to the claim for retaliatory discharge, the First Circuit likewise noted the absence of any causal nexus between Mesnick's protected conduct and the adverse employment action (Pet. App. A-43-45), thus precluding Mesnick's establishment of a *prima facie* case of retaliation. *Connell* v. *Bank of Boston*, 924 F.2d 1169, 1179 (1st Cir.), *cert. denied*, __ U.S. __, 111 S. Ct. 2828 (1991); *Oliver* v. *Digital Equip. Corp.*, 846 F.2d 103, 110-11 (1st Cir. 1988).[7] Having thus found deficient each of Mesnick's efforts to meet this preliminary burden, evidence of pretext or unlawful motive was not essential to the case's ultimate disposition and thus any technical distinction among the circuits regarding the presentation of such evidence is not outcome determinative.

In short, Mesnick's argument is predicated on the faulty assumption that the disposition of this case necessarily turned on the technical issue purportedly in conflict among the circuits, *i.e.*, whether evidence of pretext alone is sufficient to allow a discrimination case to reach a jury. In fact, this case was ripe for summary judgment before ever reaching that issue. The First Circuit discussion of pretext and motive — stated to be

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[6] As stated, the First Circuit did not alter the district court's finding that Mesnick had failed to establish a *prima facie* case for his other claims because he was unable to satisfy the requirement that he was performing his job at a level that met General Electric's expectations. *See* footnote 5, *supra*, and accompanying text. A *prima facie* case for discriminatory discharge contains this same requirement. *Olivera* v. *Nestle Puerto Rico, Inc.*, 922 F.2d 43, 45 (1st Cir. 1990). Accordingly, the First Circuit, had it elected to analyze whether Mesnick met this initial burden for his discriminatory discharge claim, could only have concluded that he did not.

[7] The requirement of a causal nexus between the protected activity and the adverse personnel action as an element of the *prima facie* case of retaliation is not peculiar to the First Circuit. *See, e.g.*, *Hollander* v. *American Cyanamid Co.*, 895 F.2d 80, 85 (2d Cir. 1990) (ADEA case); *Johnson* v. *Sullivan*, 945 F.2d 976, 980 (7th Cir. 1991) (Title VII case); *Dwyer* v. *Smith*, 867 F.2d 184, 190-91 (4th Cir. 1989) (same); *McKenna* v. *Weinberger*, 729 F.2d 783, 790 (D.C. Cir. 1984) (same).

merely for the sake of argument[8] — only demonstrated that Mesnick's claim would also have expired at a later stage of *Burdine*'s analytical scheme. Because Mesnick was unable to establish a *prima facie* case on any of his claims, no basis exists to assert that the geographic origin of this fact-specific case affected its judicial treatment and ultimate outcome. Accordingly, no inter-circuit conflict warranting this Court's attention is presented.

2. Even if the record were clear that Mesnick had established a *prima facie* case and therefore had reached the issue of pretext within the *Burdine* formula, the particular rule of evidence attributed to the First Circuit by Mesnick still would have had no bearing on the disposition of this case.

It is undisputed that General Electric, although recognizing Mesnick's technical experience, nonetheless terminated his employment due to his constantly abusive and insubordinate behavior. Nothing in the record in any way detracts from the credibility of this stated reason. Contrary to language contained in the petition, no evidence was presented to support the proposition that General Electric was "lying" about the reason for its decision.[9] Indeed, the petition's statement of facts either concedes or leaves undisputed the fact that Mesnick repeatedly harangued General Electric managers over many months. (Pet. 4-13). Thus, while it may be true that the outcome of other cases might be affected by the circuits' differing formulations of this rule of evidence where at least some evidence is adduced that the employer lied when explaining its action, this is not such a case.

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[8] That the First Circuit continued its discussion through the burden-shifting formula despite Mesnick's failure to surmount the preliminary hurdle of establishing a *prima facie* case in no way affects this conclusion. Indeed, this further *arguendo* discussion appears to be directly related to the First Circuit's interest in defining the analytical framework within which future motions for summary judgment should be evaluated.

[9] Each of Mesnick's primary arguments in support of his petition erroneously assumes that evidence was presented that General Electric was "lying about its reason for the adverse employment decision." (Pet. 16, 20). No such evidence was offered here.

Indeed, where the plaintiff presents no evidence showing the employer's proferred reason is unworthy of credence, he must instead persuade the court that "a discriminatory reason more likely motivated the employer." *Burdine*, 450 U.S. at 256. It is precisely because Mesnick adduced no evidence calling into question General Electric's explanation for its decision to terminate his employment that both courts below, consistent with *Burdine*'s directive, searched the record for evidence of a discriminatory motive. Having found none,[10] the case's summary disposition was fully appropriate.

In view of this uncontroverted record, Mesnick's inability to demonstrate a factual dispute regarding General Electric's proffered reason or the legality of its motive is not surprising. Instead, Mesnick relies solely on one sentence in the First Circuit's opinion to launch a wholly theoretical argument. Specifically, within the context of its discussion of the claim of discriminatory discharge, the First Circuit remarked in passing that "Mesnick created a triable issue of fact anent pretext *vel non*." (Pet. App. A-30).[11] Since this remark was itself premised

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[10] As the First Circuit opinion observed, Mesnick offered only "two isolated tidbits to indicate GE's discriminatory animus." (Pet. App. A-32). The district court was equally unimpressed by the probative value of such evidence. (Pet. App. B-25-26). *See* footnote 2, *supra*.

[11] The meaning of this gratuitous remark is somewhat obscure. Nowhere in the First Circuit opinion is there any discussion of evidence of pretext, much less evidence which creates a factual question regarding General Electric's explanation for its actions. In addition, the First Circuit did not disturb the district court's finding that Mesnick was unable to establish a *prima facie* case for discriminatory discharge and simply discussed *arguendo* the effect of the remainder of the *Burdine* formula on this claim. *See* footnote 6, *supra*. As a result, it is clear that this dictum was not intended to transform this case, involving patently unworthy claims, into a test case for this Court's consideration. In all likelihood, this passing reference relates only to Mesnick's admitted technical skills and its inclusion simply provided the First Circuit with an opportunity to explicate further the analytical scheme applicable to future dispositive motions. Because Mesnick's technical experience is inapposite to the reason for his termination, i.e., gross insubordination, any evidence of such experience is not probative on the issue of pretext.

upon a mere *arguendo* assumption that a *prima facie* case had been established, it is clearly dictum. (Pet. App. A-30, n.7).

Clutching at this slender reed, Mesnick strains to construct an abstract argument, entirely divorced from the reality of this record, which asserts that an employee who exposes the falsity of his employer's stated reason should not be required to produce additional evidence of a discriminatory motive to get to a jury. Whatever the proper resolution of this question, it is irrelevant here where no evidence exists to question the credibility of the employer's explanation.

CONCLUSION

The petition for a writ of certiorari should be denied.

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